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No. 76-162

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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**VANIS RAY ROBBINS AND RUSSELL PATTERSON,**  
**PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**ROBERT H. BORK,**

*Solicitor General,*

**RICHARD L. THORNBURGH,**

*Assistant Attorney General,*

**WILLIAM G. OTIS,**

*Attorney,*

*Department of Justice,*

*Washington, D.C. 20530.*

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**OPINION BELOW**

The memorandum of the court of appeals (Pet. App. 2a-3a) is unreported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 1a) was entered on April 28, 1976. A petition for rehearing was denied on June 9, 1976. Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to August 6, 1976, and the petition was filed on August 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

### QUESTION PRESENTED

Whether changes in the dates of some of the acts alleged in the indictment amounted to an impermissible amendment.

### STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioners were convicted of conspiracy to carry on an unlawful gambling enterprise with the use of a facility in interstate commerce, in violation of 18 U.S.C. 371. Petitioner Robbins also was convicted of two counts of conducting an illegal gambling enterprise, in violation of 18 U.S.C. 1952, and of two counts of transmitting wagering information by wire across state lines, in violation of 18 U.S.C. 1084. Robbins was sentenced to concurrent terms of two years' imprisonment and fined a total of \$5000. Patterson was sentenced to six months' imprisonment, to be followed by 18 months' probation.

The sufficiency of the evidence is not in dispute. It showed that Robbins operated a bookmaking business in Elmwood Place, Ohio; he specialized in making book on horse races, including races at a track near Covington, Kentucky. He accepted bets relayed to him by Patterson and others, and he received results of the races that were called in to him from Kentucky from a telephone near the track (Tr. 84-96, 380-382, 1358-1377).

The nine-count indictment named petitioners and 16 others as defendants (App. 2-11).<sup>1</sup> Count I charged that from "on or about March 19, 1970,\* \* \* up to and including March 30, 1970" (App. 2) the defendants conspired to commit gambling offenses. It described the conspiracy in detail and listed 15 overt acts, including the dates on which each act occurred (App. 3-6). The remaining counts charged substantive offenses. Count II charged that "on or about" March 23, 1970, Robbins and two other defendants used a telephone to transmit gambling information in violation of state law (App. 7); Count IV charged that "on or about" March 26, 1970, Robbins and another defendant committed a similar offense (App. 8); Count VII charged that "on or about" March 23, 1970, Robbins made an interstate telephone call to facilitate his gambling enterprise (App. 10).

On October 29, 1974, approximately one month before the opening of trial, the prosecution moved to amend some of the dates set forth in the indictment (App. 12-14). At a hearing on October 31, 1974, the court indicated that it would allow the requested changes (App. 32-34), and it later entered an order to that effect (App. 15-17).<sup>2</sup>

<sup>1</sup> "App." refers to the appendix to petitioners' brief in the court of appeals.

<sup>2</sup> The court's order provided (App. 16-17) :

"1. With respect to Count I of the Indictment, the dates of the conspiratorial agreement alleged should read from on or about



The court authorized the government to prepare a copy of the indictment as amended, making the date changes and omitting matters not pertinent to the jury's consideration.<sup>3</sup> This amended indictment, together with the original, was submitted to the jury; the court explained that the amended version was the result of legal procedures and was "abbreviated so as to include only the matters pertinent to your consideration" (App. 37). The court twice admonished the jurors that "neither the original nor the abbreviation is evidence. You have them merely as a guide to the ascertainment of what the charges are" (App. 37; Tr. 1917).

March 19, 1970, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including April 13, 1970 [instead of March 30, 1970].

"2. On page three of the Indictment, the second overt act should read March 23, 1970, instead of March 26, 1970.

"3. On page three of the Indictment, the fifth overt act should read March 24, 1970, instead of March 23, 1970.

"4. On page four of the Indictment, the eighth overt act should read March 26, 1970, instead of March 19, 1970.

"5. On page four of the Indictment, the tenth overt act should read March 26, 1970, instead of March 21, 1970.

"6. With respect to Count II of the Indictment, the date indicated should read March 24, 1970, instead of March 23, 1970.

"7. With respect to Count IV of the Indictment, the date indicated should read March 23, 1970, instead of March 26, 1970.

"8. With respect to Count VII of the Indictment, the date indicated should read March 24, 1970, instead of March 23, 1970."

<sup>3</sup> The amended indictment omitted a reference to 18 U.S.C. 1084 in Count I and deleted Counts V, VI, and VIII, which did not involve petitioners (App. 18-25).

# ARGUMENT

It has long been accepted that an indictment can be altered if the alteration does not enlarge, change, or affect any essential element of the offense charged. *Stewart v. United States*, 395 F. 2d 484 (C.A. 8). See *United States v. Pandilidis*, 524 F. 2d 644, 647 (C.A. 6):

[A] mere change of date is not normally considered a substantial variation in an indictment, [except] where the date of the alleged offense affects the determination of whether a crime has been committed.

The gambling and conspiracy statutes under which petitioners were indicted do not depend in any way on the dates of the offenses or overt acts.<sup>4</sup> The dates serve only to put defendants on notice of the times the crimes probably took place; it would not be a defense for petitioners to show that their crimes took place earlier or later. The court of appeals therefore correctly held that "the dates contained in the indictment were not essential elements of the offense and \* \* \* no prejudice has resulted to [petitioners] by their alteration" (Pet. App. 3a).

The decision below does not conflict with *United States v. Goldstein*, 502 F. 2d 526 (C.A. 3); to the con-

<sup>4</sup> Even the two-week extension of the closing date of the conspiracy is immaterial. The existence of a criminal agreement, not its duration, is the essence of the crime of conspiracy. *Pinkerton v. United States*, 328 U.S. 640. Moreover, none of the amended dates of the overt acts was later than March 30, 1970, the last day of the conspiracy as originally charged.

trary, the Sixth Circuit has endorsed *Goldstein*. See *United States v. Pandilidis, supra*. *Goldstein* involved an indictment for willful failure to file an income tax return on or before April 15, 1966. It was established at trial that *Goldstein* had received an extension of his filing date and that his return was not due until May 7, 1966. The trial court nonetheless allowed the jury to convict if it found that *Goldstein* failed to file by that date, in effect amending the indictment (502 F. 2d at 527-528). The court of appeals reversed the conviction, holding that the date alleged in the indictment was an essential element of the charge and that the trial court's amendment therefore was improper. The court of appeals also thought that if the fact that the defendant had sought an extension had been called to the attention of the grand jury, it might have found the element of willfulness lacking.<sup>5</sup> *Goldstein* contrasted the crime at issue there with an offense where the date was irrelevant, such as a bank robbery, and concluded that an amendment as to date would be permissible in the latter case (502 F. 2d at 528). The instant offenses are like the bank robbery discussed in *Goldstein*.<sup>6</sup>

<sup>5</sup> We think that *Goldstein* was wrongly decided. It involved a crime that could have been charged by information as well as by indictment; an information could have been amended at any time, and the court's speculation about the grand jury's reaction to additional evidence is meaningless because the prosecutor could have substituted an information for the indictment. We do not rely upon these arguments here, however, because petitioners were convicted of crimes for which an indictment is necessary.

<sup>6</sup> Petitioners contend (Pet. 11) that the dates in their indictment were "crucial and essential elements" because, if they did

There is nothing to petitioners' additional claim that the jury should not have been given a copy of the amended indictment. The alterations merely clarified for the jury the matters requiring decision. The amended indictment was submitted with the original; appropriate cautionary instructions were given. So long as the alterations were proper, it was not error to submit them to the jury.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. BORK,  
*Solicitor General*

RICHARD L. THORNBURGH,  
*Assistant Attorney General*

WILLIAM G. OTIS,  
*Attorney*

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not match the dates of the intercepted telephone conversations that were introduced at trial, that evidence would have been "worthless." This assertion is insubstantial; all of the dates at issue were prefaced in the indictment with the phrase "on or about," and with or without the alterations of the dates, petitioners' incriminating conversations would have been admissible at trial.